Supreme Court, U.S.
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In The

Supreme Court of the United States

CORRIE MILES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeal for the Ninth Circuit erred in upholding Respondent Commissioner of the Internal Revenue's determination that a levy under Internal Revenue Code §6331 extends to the assets of a retirement plan qualified under the Employee Retirement Income Security Act when the plan participant has neither plan assets in her possession nor a present right to payments/distributions from the plan.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Corrie Miles, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported, but is attached in the Appendix. (App. A) The opinion of the United States Tax Court is reported at 2010 WL 3937958 (9th Cir. Oct. 7, 2010). (App. B).

STATEMENT OF JURISDICTION

The Memorandum from the United States Court of Appeals for the Ninth Circuit was filed October 7, 2010 by KOZINKSKI, Chief Judge, WARDLAW, Circuit Judge, and SINGLETON, Senior District Judge (Case No, 07-74476; Tax Ct. No. 16887-05L). This writ of certiorari is filed within ninety (90) days thereof. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CITATIONS OF STATUTES

The relevant statutory provisions involved are Internal Revenue Code § 6331 (App. C), Internal Revenue Code § 6334 (App. D), 29 U.S.C. § 1053(a)(1) (App. E), 29 U.S.C. § 1056(a) (App. F), and 28 U.S.C.

§ 1254(1) (App. G), the text of which are set out in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner seeks review of the Ninth Circuit's decision allowing the Respondent to immediately levy the assets of an ERISA plan that she participates in even though the ERISA plan is not currently in payout status to Petitioner.

Petitioner was originally assessed tax liability by the Respondent for the years the tax years ending December 31, 1997 and December 31, 1998 because she filed joint tax returns with her husband at the time – even though the tax liability was incurred exclusively by her husband. Petitioner subsequently filed for divorce. Respondent sought to enforce the tax liability assessment against Petitioner individually and filed several Federal Tax Lien's on Petitioner's Individual Retirement Account (IRA). Petitioner then filed for Chapter 7 bankruptcy protection and her tax liability was discharged. Petitioner then gained employment with a California corporation with an ERISA plan, and she ultimately rolled her IRA into her employer's ERISA plan.

Respondent contends that the liens it filed on Petitioner's IRA before she filed for bankruptcy protection survive the bankruptcy proceeding, follow the transfer of the IRA assets into the ERISA plan, and attach to the ERISA plan assets. Respondent provided three alternatives to Petitioner: (1) disgorge the account assets within thirty (30) days;

(2) allow a levy on the account assets to avoid early withdrawal penalties, or (3) if neither of the previous two options were palatable, Petitioner could appeal Respondent's Notice of Determination.

Petitioner could not disgorge the assets of the ERISA plan because she was neither the trustee of the ERISA plan nor was she entitled to any payments from the ERISA plan. Whether petitioner agreed to a Federal Tax Levy on the ERISA plan was a moot point because there is no authority that allows a Federal Tax Levy to extend to the assets of an ERISA plan in Petitioner's situation. Respondent's Notice of Determination stated that Respondent could immediately levy assets of the ERISA plan to satisfy the Federal Tax Liens filed prior to Respondent's bankruptcy petition. Petitioner appealed to the United States Tax Court and then to the United States Court of Appeal for the 9th Circuit seeking a determination that Respondent abused its discretion prior to and in accordance with the issuance of its Notice of Determination.

REASONS WHY PETITION SHOULD BE GRANTED

Neither Internal Revenue Code § 6331 nor United States v. Novak 476 F. 3d 1041 (9th Cir. 2007) provide Respondent with authority to levy the assets contained in an ERISA plan which Petitioner currently participates in as an employee of Chapters, Inc., a California corporation.[1] Respondent, the Tax

1. Petitioner has been continuously employed with Chapters, Inc. as a copy editor since October 2004.

Court and the Ninth Circuit relied on both and therefore erred in reaching their determinations.

1. A Levy Extends Only to Property Possessed at the Time of the Levy

Internal Revenue Code § 6331 provides power to the IRS to levy certain taxpayer assets to satisfy liens. The term "levy" includes the power of distraint and seizure by any means. § 6331(b). Except as otherwise provided in § 6331(e) [salary and wages], a levy shall extend **only** to property possessed and obligations existing **at the time thereof**. *Id.* The IRS can collect tax liabilities if there is a validly existing lien on the **accrued** salary or wages of a taxpayer by providing notice of levy to the taxpayer's employer. § 6331(a). And, a levy can only be continuous in limited circumstances: (1) when first made on the taxpayer's salary and wages (§ 6331(e)) and/or (2) on specified payments under § 6331(h)(1)[2]. In summary, a levy **only** applies to a property possessed **at the time of** the levy.

2. A Plan Participant Does Not Possess the Assets of an ERISA Plan

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2. "Specified Payment" means (A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee, (B) any payment described in paragraph (4), (7), (9), or (11) of Section 6334(a), and (C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act. § 6331(h)(2).

A participant in an ERISA plan does not possess any assets until she has met certain qualifications. ERISA only guarantees a participants a right to begin receiving payments sixty days after the close of the year in which they turn sixty-five, complete ten years of service with the company, or leave the company, whichever occurs latest. 29 U.S.C. §1056(a). Until that qualifying event, the plan participant does not possess any assets of the ERISA plan.

Respondent is a plan participant in her employer's ERISA plan, she has been continuously employed with Chapters, Inc. since October 2004, she has worked at Chapters, Inc. less than ten (10) years, and she is not close to sixty-five years old. Petitioner did not possess assets in the ERISA plan at the time Respondent sought to extend its levy.

Respondent agrees to an extent. Specifically in correspondence from IRS counsel's to Petitioner's counsel on September 20, 2006, the IRS admitted that "The Services' right to payment as a result of a levy on a pension plan is only as extensive as the taxpayer's right to payment. If the taxpayer is currently entitled to monthly payments, the Service is entitled to receive those monthly payments by levy. See, e.g., Shanbaum v. United States, 32 F. 3d 180 (5th Cir. 1994). If the taxpayer only has the right to receive payments at some future date (e.g., upon retirement and/or a specific age), then the Service is not entitled to receive any payments as a result of its levy until such future date." Respondent's position to date has been that last sentence. And the

Tax Court and Ninth Circuit both agree with Respondent on the presumption that an ERISA plan participant has a nonforfeitable right in the accrued benefits of the plan. 29 U.S.C. § 1053(a)(1).

However, a "nonforfeitable right" is not synonymous with "property possessed" and by the explicit language of § 6331, a levy only applies to the latter. Therefore, the finding by Respondent, the Tax Court and the 9th Circuit is in error on that particular point. There can be no levy until Petitioner has a possessory property interest in the ERISA plan – a payout of the ERISA plan assets.

3. The Two Prong Novak Test Does Not Apply to Petitioner

In United States v. Novak 476 F. 3d 1041 (9th Cir. 2007), the Ninth Circuit determined that a Federal Tax Levy can demand (1) that a retirement plan directly pay to the IRS any post-retirement payments that otherwise would have automatically gone to the taxpayer; and (2) if the plan allows the participant to demand payment before retirement or at a different rate - including immediate payment of the entire present value of benefits - the full amount that the participant could presently demand.

The first prong of Novak is not applicable to Petitioner. While the Ninth Circuit found that a Federal Tax Levy can demand that an ERISA plan pay directly to the IRS any post-retirement payments that otherwise would have gone to a taxpayer, in this instance the ERISA plan is NOT a

party to this proceeding. Further, the ERISA plan must be in payout status to the taxpayer in order for the first prong to apply in conjunction with § 6334. A levy cannot extend to an ERISA plan or the assets thereof, unless the plan participant possesses the assets at the time of the levy. In the ERISA arena, that only occurs with regard to post-retirement payments. There simply is no authority that the levy applies but merely "sits out there" until such time as the ERISA plan enters payout status. § 6334 is explicit: the IRS can swoop in and levy an existing asset and in limited circumstances it can continue to levy payments of salaries, wages and specified payments. There is no provision that a levy applies to any and all payment distributions from an ERISA plan in payout status – continuously. A levy could only apply to a plan participant's assets in the ERISA plan if the plan participant can demand a lump sum distribution upon retirement or upon the first distribution payment.

The second prong of Novak is not applicable to Petitioner because a participant in an ERISA plan has no right to demand payment – the plan is either in payout status or not[3]. The Ninth Circuit tangentially found that if the assets were held in an IRA or annuity, the IRS could levy the plan assets and demand immediate payment – albeit presumably subject to the requisite tax and penalties. It wouldn't be an ERISA plan if a plan

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3. Again ERISA only guarantees participants a right to begin receiving payments sixty days after the close of the year in which they turn sixty-five, complete ten years of service with the company, or leave the company, whichever occurs latest. 29 U.S.C § 1056(a).

participant could demand payment before one of those qualifying events. And if the plan participant cannot demand an immediate payment from an ERISA plan, the plan participant cannot be deemed to have a possessory interest.

As stated, Petitioner cannot comply with the Respondent's demand to either disgorge the ERISA plan assets or allow a levy on the ERISA plan assets to avoid early withdrawal penalties. Nor can Respondent extend a levy to the ERISA plan as it is not in payout status to Petitioner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE COURT OF APPEALS FOR THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT SUVMITTED AUGUST 6, 2010 AND FILED OCTOBER 7, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-74476 / Tax Ct. No. 16887-05L

CORRIE MILES,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

MEMORANDUM*

(August 6, 2010)[1]**

Before: KOZINSKI, Chief Judge, WARDLAW, Circuit Judge, and SINGLETON, Senior District Judge. ***

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* This Disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral arguments *See* Fed. R App. P. 34(a)(2)

*** The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

Appendix A

Corrie Miles appeals the United States Tax Court's decision that the Commissioner of Internal Revenue may collect unpaid federal income tax liabilities from her retirement assets. We affirm.

In 1998 and 1999 the Commissioner filed federal tax liens for Miles' 1997 and 1998 tax liabilities which attached to her pre-Chapter 7 IRA to the extent of its then value. Although the bankruptcy court discharged her personal tax liability, the pre-existing liens on her IRA remain enforceable post-discharge. *Connor v. United States (In re Conner)*, 27 F. 3d 365, 366 (9th Cir. 1994). Therefore, the Tax Court correctly concluded that the Commissioner could proceed *in rem* against Miles' IRA to the extent of $142,545.90-the amount of the pre-petition funds in the IRA.

The Tax Court also properly concluded that the liens remain valid even after Miles allegedly[2] transferred her IRA into an ERISA-qualified plan. The transfer of property following the attachment of a lien does not affect the lien itself. *United States v. Bess*, 357 U.S. 51, 57 (1958). Therefore, Miles could not in effect extinguish the lien by transferring the IRA funds to a different account. *United Sates v. Rodgers*, 461 U.S. 677. 691 n.16 (1983).

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1. Miles has not introduced evidence that she actually transferred the funds in her IRA to an ERISA-qualified pension plan

Appendix A

Any funds Miles transferred from her IRA to and ERISA-qualified plan are subject to levy by the IRS. I.R.C. & 6331 authorizes the IRS to levy "all property and rights to property" to collect assessed income tax liabilities. *See United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719-20 (1985). And while I.R.C & 6334 specifically exempts certain pension plans from levy --- such as those under the Railroad Retirement Act --- ERISA pension plans are not so exempt.

The Tax Court also properly rejected Miles's assertion that she has no existing property rights in an ERISA account that is not in "payout" status. An ERISA planholder has a nonforfeitable right in the accrued benefits of the plan. 29 U.S.C. & 1053(a)(1). "[N]onforfeitable" is defines as an unconditional claim to a deferred benefit of the plan arising from the participant's contributions. 29 U.S.C. & 1002(19). The IRS may collect and levy on "post-retirement payments that otherwise would have automatically gone to the taxpayer." *United States v. Novak*, 476 F.3d 1041, 1062(9th Cir. 2007) (en banc). Miles had the burden of showing that she transferred the funds in her IRA to an ERISA-qualified plan that was not in payout status. *See id.* at 104. Because she failed to meet that burden, the IRS settlement officer's final proposal to Iles was not an abuse of discretion. *See Fargo v. Comm'r*, 447 F.3d 706, 709(9th Cir. 2006).

AFFIRMED

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES TAX COURT DATED JULY 31, 2007

IN THE UNITED STATES TAX COURT

No. 16887-05

CORRIE MILES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

(July 31, 2007)

Before: VASQUEZ, Judge

MEMORANDUM OPINION

Pursuant to section 6330(d),[1] petitioner seeks review of respondent's determination to proceed with collection of her unpaid 1997 and 1998 income tax liabilities. The sole issue for decision is whether respondent may proceed with collection of petitioner's 1997 and 1998 income tax liabilities.

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1. Unless otherwise indicated, all section references are to the Internal Revenue Code as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Appendix B

Background

Some of the facts have been stipulated and are so found. The stipulation of facts and the attached exhibits are incorporated herein by this reference. At the time the petition was filed, petitioner resided in California.

The 1997 and 1998 Federal Tax Liens

Petitioner and her former spouse, Gregory Romine (Mr. Romine), were married during the years in issue. They divorced in 2003. On September 16, 1998, petitioner and Mr. Romine filed a joint Federal income tax return for 1997 (the 1997 return). On the 1997 return, petitioner and Mr. Romine reported tax due of $254,400 and withholding tax credits of $24,700. No payment accompanied the return.[2]

On October 26, 1998, respondent assessed the tax reported on the 1997 return, interest, and additions to tax. On January 8, 1999, respondent filed a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 (NFTL) with the San Diego County Recorder's office with respect to petitioner and Mr. Romine's 1997 income tax liability. Petitioner and Mr. Romine filed a joint federal income tax return for the 1998 return

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2. Petitioner and Mr Romine paid $65,000 toward their 1997 tax liability on Jan. 19, 1999. A credit for overpayment of tax from Mr. Romine's 2002 taxes was also applied against the 1997 liability. Additionally, a payment of $175,964.37 was made toward the 1997 liability on Nov. 12, 2003.

reporting tax due of $77,733 and withholding tax credits of $24,915. No payment accompanied that return.[3]

On June 7, 1999, respondent assessed the tax reported on the 1998 return, interest, and additions to tax. On July 3, 2000, respondent assessed additional tax of $54,368 pursuant to an agreement executed by petitioner, Mr. Romine, and respondent. On October 19, 1999, respondent filed an NFTL with the San Diego County Recorder's office with respect to petitioner and Mr. Romine's 1998 income tax liability.

Petitioner's Bankruptcy Proceedings

On May 19, 2003, petitioner filed a petition pursuant to chapter 7 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of California (the Bankruptcy Court). In connection with her bankruptcy case, petitioner filed a complaint to determine the dischargeability of her Federal income tax liabilities for the tax years 1996, 1997, and 1998. On July 22, 2003, the Bankruptcy Court entered a stipulation for entry of judgment and judgment thereon in which the Bankruptcy Court determined that petitioner's 1996, 1997, and 1998 tax liabilities would be discharged upon the entry of an order granting petitioner a discharge in her bankruptcy case. On August 25, 2003, the

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3. A payment of $741.48 was made toward the 1998 liability on May 24, 2002.

Bankruptcy Court entered an order of discharge in petitioner's bankruptcy case pursuant to 11 U.S.C. section 727 (2000).

Petitioner's Individual Retirement Account

On the date she filed her chapter 7 bankruptcy petition, petitioner owned an individual retirement account (IRA) worth $142,545.90.

Respondent's Collection Efforts

On December 4, 2003, Revenue Officer Cindy Alexander (Ms. Alexander) was assigned to investigate enforcement of the Federal tax liens with respect to petitioner's 1997 and 1998 tax liabilities. Ms. Alexander determined that the Federal tax liens for 1997 and 1998 attached to petitioner's IRA to the extent of its value of $142,545.90 on the date petitioner filed her petition in her bankruptcy case. On March 18, 2004, Ms. Alexander sent petitioner a Final Notice-Notice of Intent to Levy and Notice of Your Right To a Hearing with regard to petitioner's 1997 and 1998 tax liabilities (notice of intent to levy). On April 14, 2004, petitioner sent to respondent a Form 12153, Request for a Collection Due Process Hearing. In the Form 12153, petitioner stated that she disagreed with the collection action proposed in respondent's notice of intent to levy and requested a hearing pursuant to section 6330(b).

Petitioner's Section 6330 Hearing

Petitioner's section 6330 hearing was assigned to Settlement Officer Cynthia Chadwell (Settlement

Officer Chadwell). Petitioner's section 6330 hearing consisted of phone calls and a written correspondence between Settlement Officer Chadwell and petitioner's representatives that occurred between March and July of 1998. As discussed *infra*, petitioner raised two arguments during the hearing. Petitioner argued that respondent erroneously determined that the Federal tax liens continued to be valid against petitioner's interest in her IRA after her discharge from personal liability on the 1997 and 1998 income tax liabilities in her chapter 7 bankruptcy case. Petitioner also argued that respondent erroneously determined that the Federal tax liens remained valid after petitioner allegedly transferred the funds in her IRA into a pension plan administered by petitioner's new employer. Settlement Officer Chadwell determined to proceed with the proposed levy, and respondent issued to petitioner a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 on July 29, 2005.

Discussion

Section 6331(a) provides that, if any person liable to pay any tax neglects or refuses to do so within 10 days after notice and demand, the Secretary generally can collect such tax by levy upon all property and rights to property belonging to such person or on property on which there is a Federal tax lien. Pursuant to section 6331(d), the Secretary is required to give the taxpayer notice of his intent to levy and within that notice must describe the

administrative review available to the taxpayer before proceeding with the levy. See also sec. 6330(a). Section 6330(b) describes the administrative review process, providing that a taxpayer can request an Appeals hearing (section 6330 hearing) with regard to a levy notice.[4] Pursuant to section 6330(c)(2)(A), a taxpayer may raise at the section 6330 hearing any relevant issue with regard to the Commissioner's collection activities, including spousal defenses, challenges to the appropriateness of the Commissioner's intended collection action, and alternative means of collection. *Sego v. Commissioner*, 114 T.C. 604, 609, 2000 WL 889754 (2000); *Goza v. Commissioner*, 114 T.C. 176, 180, 2000 WL 283864 (2000).

When the Commissioner issues a determination regarding a disputed collection action, section 6330(d) permits a taxpayer to seek review in this Court. If the underlying tax liability is properly at issue, we review that issue de novo. *Sego v. Commissioner*, *supra* at 610; *Goza v. Commissioner*, *supra* at 181. If the validity of the underlying tax

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4. Although the NFTLs were filed before the effective date of secs. 6320 and 6330, which apply to collection actions (cont'd) initiated after Jan. 18, 1999, the collection due process procedures apply to the matter before us because the levy notice was issued after that date. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, sec 3401, 112 Stat. 746; *Parker v. Commissioner*, 117 T.C. 63, 2001 WL 946540 (2001).

liability is not at issue, we review the Commissioner's Commissioner's determination for abuse of discretion. *Sego v. Commissioner, supra* at 610.

We have previously held that this Court has jurisdiction in a levy proceeding instituted pursuant to section 6330(d)(1) to determine whether a taxpayer's unpaid tax liabilities were discharged in bankruptcy. *Swanson v. Commissioner*, 121 T.C. 111, 120-121, 2003 WL 22020782 (2003); *Washington v. Commissioner*, 120 T.C. 114, 120-121, 2003 WL 840965 (2003). In *Washington*, we did not specifically address the appropriate standard of review to apply when determining whether a taxpayer's tax liabilities were discharged in bankruptcy where, as in the matter before us, the taxpayer has not received a notice of deficiency. In this case, the parties have stipulated that all of the evidence contained in the trial record was available to Settlement Officer Chadwell in making her determination. For the reasons discussed *infra*, our review of that evidence causes us to sustain Settlement Officer Chadwell's determination to proceed with collection whether we apply an abuse of discretion or a de novo standard of review. Petitioner bears the burden of proof. See Rule 142(a).

In her petition, petitioner appears to argue that respondent erred in determining that the Federal tax liens for petitioner's 1997 and 1998

income tax liabilities were valid at the time they were filed. During petitioner's section 6330 hearing, petitioner's counsel advised respondent that "[we] do not disagree that the above mentioned [sic] liens are valid liens". Moreover, at trial, petitioner failed to introduce any evidence or raise any specific argument supporting her contention that the Federal tax liens were invalid as filed. We conclude that petitioner has abandoned that issue. *Petzoldt v. Commissioner*, 92 T.C. 661, 683-687, 1989 WL 27845 (1989).

Petitioner further contends that respondent erroneously determined that the Federal tax liens continued to be valid against petitioner's interest in her IRA after her discharge from personal liability on the 1997 and 1998 income tax liabilities in her chapter 7 bankruptcy case. We have specifically held that a discharge from personal liability in a chapter 7 bankruptcy case does not extinguish a prepetition Federal tax lien. *Iannone v. Commissioner*, 122 T.C. 287, 2004 WL 830777 (2004); see also 11 U.S.C. sec. 522(c)(2)(B) (providing that exempt property remains subject to properly filed tax liens even though the underlying tax claim may have been discharged); *Connor v. United States*, 27 F.3d 365, 366 (9th Cir.1994) ("A preexisting lien on property, however, remains enforceable against that property even after an individual's personal liability has been discharged.").Petitioner also contends that respondent erroneously determined that the Federal tax liens remained valid after petitioner allegedly

transferred the funds in her IRA into a pension plan administered by petitioner's employer, Chapters, Inc. Petitioner contends that she rolled over her IRA into the pension plan, which petitioner alleges was established under the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. 93-406, sec.2003, 88 Stat. 871.

At both her section 6330 hearing and at trial, petitioner failed to produce any evidence to support her contention that she transferred her IRA funds into an ERISA-qualified pension plan. If a party fails to introduce evidence within that party's possession, we may presume in some circumstances that, if produced, the evidence would be unfavorable to that party. *Wichita Terminal Elevator Co. v. Commissioner*, 6 T.C. 1158, 1165, 1946 WL 298 (1946), affd. 162 F.2d 513 (10th Cir.1947). This is true where the party that does not produce the evidence has the burden of proof or the other party has established a prima facie case. *Id.* As noted *supra*, petitioner bears the burden of proof in the matter before us. Petitioner repeatedly refused to supply respondent with any information regarding the account, its status, or its location.[5]

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5. For example, on Mar. 9, 2005, in response to a letter from respondent requesting information about petitioner's IRA funds, petitioner's counsel, Mr. Preovolos, informed respondent only that "Currently the asset that you seek to levy is unavailable." The record also indicates that Chapters, Inc., the employer that allegedly administered the ERISA-qualified plan, was formed in 2004, while petitioner was disputing the liens on

(*Cont'd*)

We therefore conclude that no evidence in petitioner's possession would establish that petitioner transferred the funds in her IRA into an ERISA-qualified pension plan.

Additionally, petitioner's argument that the lien on the IRA was extinguished when petitioner transferred the funds in the IRA into an ERISA-qualified pension plan is incorrect. As respondent correctly notes: "The transfer of property subsequent to the attachment of the lien does not affect the lien, for 'it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere'." *United States v. Bess*, 357 U.S. 51, 57, 78 S.Ct. 1054, 2 L.Ed.2d 1135 (1958) (quoting *Burton v. Smith*, 38 U.S. 464, 483, 13 Pet. 464, 10 L.Ed. 248 (1839)); see also *Michigan v. United States*, 317 U.S. 338, 340, 63 S.Ct. 302, 87 L.Ed. 312 (1943); *United States v. Morrison*, 29 U.S. 124, 4 Pet. 124, 7 L.Ed. 804 (1830).

Petitioner also argues that the antialienation provisions of ERISA prevent respondent from levying against petitioner's alleged interest in the ERISA-qualified pension plan. Numerous courts-including, on several occasions, the U.S. Court of Appeals for the Ninth Circuit (to which this case is appealable)-have expressly rejected the argument that ERISA

(*Cont'd*)
her IRA before respondent. The mailing address for Chapters, Inc., appears to be petitioner's personal mailing address.

antialienation provisions preclude enforcement of a Federal tax levy. See, e.g., *United States v. Novak*, 476 F.3d 1041 (9th Cir.2007); *United States IRS v. Snyder*, 343 F.3d 1171, 1179 (9th Cir.2003); *McIntyre v. United States*, 222 F.3d 655, 660 (9th Cir.2000); *Anderson v. United States*, 149 Bankr.591, 595 (B.A.P. 9th Cir.1992); see also *United States v. Sawaf*, 74 F.3d 119 (6th Cir.1996); *Shanbaum v. United States*, 32 F.3d 180 (5th Cir.1994).

Finally, petitioner argues that her alleged interest in the ERISA-qualified plan does not constitute "property [or] rights to property" for the purpose of section 6321 and thus is not subject to lien or levy. We need not pass on the merits of this argument: As noted *supra*, at the section 6330 hearing and at trial, petitioner failed to introduce any evidence to support her claim that she transferred the funds in her IRA into an ERISA-qualified pension plan. We therefore conclude that no evidence in petitioner's control would establish that petitioner's interest does not remain subject to the Federal tax liens. See *Wichita Terminal Elevator Co. v. Commissioner*, *supra*.

Petitioner has failed to raise a spousal defense, make a valid challenge to the appropriateness of respondent's intended collection, or offer alternative means of collection. We therefore uphold respondent's determination to proceed with collection of petitioner's 1997 and 1998 income tax liabilities.

Appendix B

In reaching all of our holdings herein, we have considered all the parties' arguments, and, to the extent not herein discussed, we conclude that they are irrelevant or without merit.

To reflect the foregoing,

Decision will be entered for respondent.

APPENDIX C — INTERNAL REVENUE CODE § 6331

Internal Revenue Code § 6331 provides:

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334 [IRC Sec. 6334]) belonging to such person or on which there is a lien provided in this chapter [IRC Sections 6301 et seq.] for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) [IRC Sec. 3401(d)]) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property

possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures. Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy.

(1) In general. Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 30-day requirement. The notice required under paragraph (1) shall be--

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address, no less than 30 days before the day of the levy.

(3) Jeopardy. Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4) Information included with notice. The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms--

(A) the provisions of this title relating to levy and sale of property,

(B) the procedures applicable to the levy and sale of property under this title,

(C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159 [IRC Sec. 6159]),

(E) the provisions of this title relating to redemption of property and release of liens on property, and

(F) the procedures applicable to the redemption of property and the release of a lien on property under this title.

(e) Continuing levy on salary and wages. The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such

levy is first made until such levy is released under section 6343 [IRC Sec. 6343].

(f) Uneco nical levy. No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.

(1) In general. No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy. This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Continuing levy on certain payments.

(1) In general. If the Secretary approves a levy under this subsection, the effect of such levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334 [IRC Sec. 6334], such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

Appendix C

(2) Specified payment. For the purposes of paragraph (1), the term "specified payment" means—

(A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(B) any payment described in paragraph (4), (7), (9), or (11) of section 6334(a) [IRC Sec. 6334], and

(C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

(3) Increase in levy for certain payments. Paragraph (1) shall be applied by substituting "100 percent" for "15 percent" in the case of any specified payment due to a vendor of goods or services sold or leased to the Federal Government.

(i) No levy during pendency of proceedings for refund of divisible tax.

(1) In general. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid divisible tax during the pendency of any proceeding brought by such person in a proper Federal trial court for the recovery of any portion of such divisible tax which was paid by such person if--

(A) the decision in such proceeding would be res judicata with respect to such unpaid tax; or

(B) such person would be collaterally estopped from contesting such unpaid tax by reason of such proceeding.

(2) Divisible tax. For purposes of paragraph (1), the term "divisible tax" means--

(A) any tax imposed by subtitle C [IRC Sections 3101 et seq.]; and

(B) the penalty imposed by section 6672 [IRC Sec. 6672] with respect to any such tax.

(3) Exceptions.

(A) Certain unpaid taxes. This subsection shall not apply with respect to any unpaid tax if--

(i) the taxpayer files a written notice with the Secretary which waives the restriction imposed by this subsection on levy with respect to such tax; or

(ii) the Secretary finds that the collection of such tax is in jeopardy.

'(B) Certain levies. This subsection shall not apply to--

(i) any levy to carry out an offset under section 6402 [IRC Sec. 6402]; and

(ii) any levy which was first made before the date that the applicable proceeding under this subsection commenced.

(4) Limitation on collection activity; authority to enjoin collection.

(A) Limitation on collection. No proceeding in court for the collection of any unpaid tax to which paragraph (1) applies shall be begun by the Secretary during the pendency of a proceeding under

such paragraph. This subparagraph shall not apply to--

(i) any counterclaim in a proceeding under such paragraph; or

(ii) any proceeding relating to a proceeding under such paragraph.

(B) Authority to enjoin. Notwithstanding section 7421(a) [IRC Sec. 7421(a)], a levy or collection proceeding prohibited by this subsection may be enjoined (during the period such prohibition is in force) by the court in which the proceeding under paragraph (1) is brought.

(5) Suspension of statute of limitations on collection. The period of limitations under section 6502 [IRC Sec. 6502] shall be suspended for the period during which the Secretary is prohibited under this subsection from making a levy.

(6) Pendency of proceeding. For purposes of this subsection, a proceeding is pending beginning on the date such proceeding commences and ending on the date that a final order or judgment from which an appeal may be taken is entered in such proceeding.

(j) No levy before investigation of status of property.

(1) In general. For purposes of applying the provisions of this subchapter [IRC Sections 6330 et seq.], no levy may be made on any property or right to property which is to be sold under section 6335 [IRC Sec. 6335] until a thorough investigation of the status of such property has been completed.

(2) Elements in investigation. For purposes of paragraph (1), an investigation of the status of any property shall include--

(A) a verification of the taxpayer's liability;

(B) the completion of an analysis under subsection (f);

(C) the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability; and

(D) a thorough consideration of alternative collection methods.

(k) No levy while certain offers pending or installment agreement pending or in effect.

(1) Offer-in-compromise pending. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax--

(A) during the period that an offer-in-compromise by such person under section 7122 [IRC Sec. 7122] of such unpaid tax is pending with the Secretary; and

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending).

For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

(2) Installment agreements. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax--

(A) during the period that an offer by such person for an installment agreement under section 6159 [IRC Sec. 6159] for payment of such unpaid tax is pending with the Secretary;

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);

(C) during the period that such an installment agreement for payment of such unpaid tax is in effect; and

(D) if such agreement is terminated by the Secretary, during the 30 days thereafter (and, if an appeal of such termination is filed within such 30 days, during the period that such appeal is pending).

(3) Certain rules to apply. Rules similar to the rules of--

(A) paragraphs (3) and (4) of subsection (i), and

(B) except in the case of paragraph (2)(C), paragraph (5) of subsection (i), shall apply for purposes of this subsection.

APPENDIX D — INTERNAL REVENUE CODE § 6334

Internal Revenue Code § 6334 provides:

(a) Enumeration. There shall be exempt from levy--

(1) Wearing apparel and school books. Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects [Caution: For calendar year 2008, see § 3.37 of Rev. Proc. 2007-66 (26 USCS § 1 note) for provision that the value of property exempt from levy under this paragraph may not exceed $ 7,900.]. So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $ 6,250 in value;

(3) Books and tools of a trade, business, or profession [Caution: For calendar 2008, see § 3.37 of Rev. Proc. 2007-66 (26 USCS § 1 note) for provision that the value of property exempt from levy under this paragraph may not exceed $ 3,950.]. So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $ 3,125 in value;

(4) Unemployment benefits. Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered mail. Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments. Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities

based on retired or retainer pay under chapter 73 of title 10 of the United States Code [10 USCS §§ 1431 et seq.]. [hp note: 1431 is all armed forces related].

(7) Workmen's compensation. Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children. If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income. Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such

amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments. Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under-

(A) subchapter II, III, IV, V, or VI of chapter 11 of such title 38 [38 USCS §§ 1110 et seq., 1121 et seq., 1131 et seq., 1141 et seq., or 1151 et seq.], or

(B) chapter 13, 21, 23, 31, 32, 34, 35, 37, or 39 of such title 38 [38 USCS §§ 1301 et seq., 2101 et seq., 2301 et seq., 3100 et seq., 3201 et seq., 3451 et seq., 3500 et seq., 3701 et seq., or 3901 et seq.].

(11) Certain public assistance payments. Any amount payable to an individual as a recipient of public assistance under--

(A) title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act [42 USCS §§ 601 et seq. or 1381 et seq.], or

(B) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

(12) Assistance under Job Training Partnership Act. Any amount payable to a participant under the Job Training Partnership Act (29 U.S.C. 1501 et seq.) from funds appropriated pursuant to such Act.

(13) Residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy.

Appendix D

(A) Residences in small deficiency cases. If the amount of the levy does not exceed $ 5,000--

(i) any real property used as a residence by the taxpayer; or

(ii) any real property of the taxpayer (other than real property which is rented) used by any other individual as a residence.

(B) Principal residences and certain business assets. Except to the extent provided in subsection (e)--

(i) the principal residence of the taxpayer (within the meaning of section 121 [IRC Sec. 121]); and

(ii) tangible personal property or real property (other than real property which is rented) used in the trade or business of an individual taxpayer.

(b) Appraisal. The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary shall summon three disinterested individuals who shall make the valuation.

(c) No other property exempt. Notwithstanding any other law of the United States (including section 207 of the Social Security Act [42 USCS § 407]), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(d) Exempt amount of wages, salary, or other income.

(1) Individuals on weekly basis. In the case of an individual who is paid or receives all of his wages, salary, and other income on a weekly basis, the amount of the wages, salary, and other income payable to or received by him during any week which is exempt from levy under subsection (a)(9) shall be the exempt amount.

(2) Exempt amount. For purposes of paragraph (1), the term "exempt amount" means an amount equal to--

(A) the sum of--

(i) the standard deduction, and

(ii) the aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 [IRC Sec. 151] in the taxable year in which such levy occurs, divided by

(B) 52.

Unless the taxpayer submits to the Secretary a written and properly verified statement specifying the facts necessary to determine the proper amount under subparagraph (A), subparagraph (A) shall be applied as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(3) Individuals on basis other than weekly. In the case of any individual not described in paragraph (1), the amount of the wages, salary, and other income payable to or received by him during any applicable pay period or other fiscal period (as determined under regulations prescribed by the Secretary) which is exempt from levy under subsection (a)(9) shall be

an amount (determined under such regulations) which as nearly as possible will result in the same total exemption from levy for such individual over a period of time as he would have under paragraph (1) if (during such period of time) he were paid or received such wages, salary, and other income on a regular weekly basis.

(e) Levy allowed on principal residences and certain business assets in certain circumstances.

(1) Principal residences.

(A) Approval required. A principal residence shall not be exempt from levy if a judge or magistrate of a district court of the United States approves (in writing) the levy of such residence.

(B) Jurisdiction. The district courts of the United States shall have exclusive jurisdiction to approve a levy under subparagraph (A).

(2) Certain business assets. Property (other than a principal residence) described in subsection (a)(13)(B) shall not be exempt from levy if--

(A) a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy of such property; or

(B) the Secretary finds that the collection of tax is in jeopardy.

An official may not approve a levy under subparagraph (A) unless the official determines that the taxpayer's other assets subject to collection are insufficient to pay the amount due, together with expenses of the proceedings.

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(f) Levy allowed on certain specified payments. Any payment described in subparagraph (B) or (C) of section 6331(h)(2) [IRC Sec. 6331(h)(2)] shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h) [IRC Sec. 6331(h)].

(g) Inflation adjustment.

(1) In general. In the case of any calendar year beginning after 1999, each dollar amount referred to in paragraphs (2) and (3) of subsection (a) shall be increased by an amount equal to--

(A) such dollar amount, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) [IRC Sec. 1(f)(3)] for such calendar year, by substituting "calendar year 1998 for "calendar year 1992" in subparagraph (B) thereof.

(2) Rounding. If any dollar amount after being increased under paragraph (1) is not a multiple of $ 10, such dollar amount shall be rounded to the nearest multiple of $ 10.

APPENDIX E — 29 U.S.C. § 1053(a)(1)

29 U.S.C. § 1053(a)(1) provides:

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

APPENDIX F — 29 U.S.C. § 1056(a)

29 U.S.C. § 1056(a) provides:

(a) Commencement date for payment of benefits

Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which--

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

APPENDIX G — 28 U.S.C. § 1254

28 U.S.C. § 1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.